IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

WP(C).No. 19843 of 2007(K)

PETITIONERS:

1. **ISSAC.T.DEVASSIA,S/O.DEVASSIA AGED 55 YEARS,THORAKAPLACKAL HOUSE, KANJAR,THODUPUZHA.**

2. **SARAMMA ISSAC,W/O.ISSAC, AGED 53 YEARS, THERAKAPLACKAL HOUSE,KANJAR,THODUPUZHA.**

BY ADV. SRI.M.V.SABU

RESPONDENTS:

1. **THE THODUPUZHA PRIMARY CO-OPERATIVE AGRICULTURAL AND RURAL DEVELOPMENT BANK LTD NO. 43881,THODUPUZHA, REP.BT ITS SECRETARY.**

2. **THE SPECIAL SALE OFFICER,THE THODUPUZHA PRIMARY CO-OPERATIVE AGRICULTURAL AND RURAL DEVELOPMENT BANK LTD NO.4388,THODUPUZHA.**

3. **THE STATE OF KERALA, REP.BY ITS SECRETARY, DEPARTMENT OF CO-OPERATION, GOVERNMENT SECRETARIT, THIRUVANANTHAPURAM.**

ADDL.R4. THE SUB REGISTRAR, OFFICE OF THE SUB REGISTRAR, ARAKULAM, THODUPUZHA.

(ADDL.R4 IS IMPLEADED AS PER ORDER DATED 26.9.2007 IN IA NO. 12911/07)

R1 BY ADV. SRI.P.V.BABY

R2 & R3 & ADDL.R4 BY GOVERNMENT PLEADER (SHRI P.V. KRISHNAN)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN W.P.(C). NO.19843 OF 2007 K

PETITIONERS' EXHIBITS:

EXT.P1 TRUE COPY OF THE SALE DEED NO.1635/01 OF ARAKULAM SUB REGISTRAR OFFICE PURCHASED BY THE 1ST PETITIONER.

EXT.P2 TRUE COPY OF THE SALE DEED NO.1634/01 OF ARAKULAM SUB REGISTRAR OFFICE PURCHASED BY THE 2ND PETITIONER.

EXT.P3 TRUE COPY OF THE ENCUMBRANCE CERTIFICATE DATED 9.8.2002 FOR THE PERIOD FROM 1.1.1989 TO 9.8.2002.

EXT.P4 TRUE COPY OF THE ENCUMBRANCE CERTIFICATE DATED 9.8.2002 FOR THE PERIOD FROM 1.1.1989 TO 9.8.2002.

EXT.P5 TRUE COPY OF THE LAND TAX RECEIPT DATED 4.12.2001.

EXT.P6 TRUE COPY OF THE LAND TAX RECEIPT DATED 4.12.2001.

EXT.P7 TRUE COPY OF THE NOTICE DATED 29.5.2007 ISSUED TO THE FIRST PETITIONER ALOANG WITH SALE NOTICE DATED 16.4.2007.

EXT.P8 TRUE COPY OF THE NOTICE DATED 29.5.07 ISSUED TO THE 2ND PETITIONER ALONG WITH SALE NOTICE DATED 16.4.2007.

EXT.P9 TRUE COPY OF THE EXPLANATION DATED 11.6.2007 TO THE 2ND RESPONDENT BY THE 1ST PETITIONER.

EXT.10 TRUE COPY OF THE EXPLANATION DATED 11.6.2007 TO THE 2ND RESPONDENT BY THE 2ND PETITIONER.

RESPONDENTS' EXHIBITS:

EXT.R1(A) TRUE PHOTO COPY OF GEHAN DATED 9.10.1997 EXECUTED BY K.C. MATHEW AND MARY IN FAVOUR OF THE 1ST RESPONDENT BANK.

EXT.PR1(B) TRUE PHOTO COPY OF GEHAN DATED 27.3.1999 EXECUTED BY K.C. MATHEW AND MARY IN FAVOUR OF THE 1ST RESPONDENT BANK.

EXT.R1(C) TRUE PHOTO COPY OF ENCUMBRANCE CERTIFICATE DATED 29.6.2007 ISSUED BY THE SUB REGISTRAR'S OFFICE, ARAKKULAM.

// TRUE COPY//

PS TO JUDGE

K. M. JOSEPH, J.

W.P.C. NO. 19843 OF 2007 K

Dated this the 7th November, 2007

JUDGMENT

Petitioners have approached this Court, feeling aggrieved by the recovery steps taken by the first respondent Bank against the properties purchased by them vide Exts.P1 and P2 Sale Deeds executed by one Shri K.C. Mathew and his wife. The short question that is actually raised in the Writ Petition is based on the Encumbrance Certificates issued by the Registration Department to the petitioners which are produced as Exts. P3 and P4. It is contended that the mortgages created by their predecessors in interest are not noted in Exts.P3 and P4 Encumbrance Certificates. Learned counsel appearing on behalf of the petitioners would further point out that Sections 10 (4) and (5) of the Kerala State Co-operative (Agricultural and Rural Development Banks) Act provide for the manner in which gehan will result in the creation of an interest in the immovable property and the manner in which the notice is treated in law as

provided to all. They are extracted hereunder:

> 10(4): Notwithstanding anything contained in the Registration Act, 1908 (Central Act 16 of 1908), or any other law for the time being in force, it shall not be necessary to register any Gehan or mortgage or hypothecation created or executed in favour of the Agricultural and Rural Development Bank or a primary bank, provided the Agricultural and Rural Development Bank or the primary bank, as the case may be, sends, within such time and in such manner as may be prescribed, a copy of the declaration or instrument whereby the Gehan on mortgage or hypothecation has been created or executed for the purpose of securing repayment of the loan, to the registering Officer within the local limits of whose jurisdiction the whole or any part of the property to which the Gehan or mortgage or hypothecation relates is situate.
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> 10(5): On receipt of the copy of the declaration or instrument sent under sub-section (4), the registering Officer shall file a copy or copies thereof, as the case may be, in Book No.1, referred

> to in section 51 of the Registration Act, 1908 (Central Act 16 of 1908), and thereupon, such Gehan or mortgage or hypothecation shall be deemed to create an interest in the property to which the declaration or instrument relates and shall constitute notice to any one dealing with the said property."

2. According to petitioners, therefore, within thirty days of the creation of the gehan which is the time prescribed under Rule 3 read with the Sub-sections which I have already referred to, the mortgage has to be entered into in the requisite books and only if the same is done, interest will be created and the law will treat the same as notice to all. He would submit that in the facts of this case, in respect of the alleged gehan executed by the predecessor in interest in favour of the Bank, the procedure has not been complied with. A Counter Affidavit has been filed by the first respondent Bank. The Bank has produced Ext.R1(c) Encumbrance Certificates wherein both the mortgages are seen noted. The Bank has also produced Exts.R1(a) and R1(b)

gehan. Ext.R1(a) is dated 9.10.1997 while Ext.R1(b) is dated 27.3.1999. Therefore, going by the contention, the gehan should have been registered within a period of one month from the date of execution of the mortgage. The Encumbrance Certificate produced by the first respondent Bank would show that under the column "the date on which the document was written" in respect of Ext.R1(a) is shown as "15.10.1997" and in respect of Ext.R1(b) "4.9.1999". Counsel for the petitioners, with reference to the said dates and pointing out the dates in Exts.R1(a) and R1(b), would submit that this would again show that their contention that gehan is not registered as required in Section 10 read with Rule 3 is correct. In the Counter Affidavit filed by the additional fourth respondent who is the Sub Registrar, it is stated that it is all on account of a mistake. Two Encumbrance Certificates were issued, one in favour of the petitioners and another in favour of the first respondent Bank. There were differences as noted. The fact that the Encumbrance Certificate issued is erroneous, cannot advance the case of the

petitioners. Provided that the property is subject to mortgage in law, it is not open to the party to extricate himself from the fact of the mortgage except in the manner provided for in law. Therefore, the question essentially is whether the registration as provided under Section 10 with Rule 3 exists. This Court called for the relevant Books. Counsel for both the parties had occasion to peruse the Books. In regard to Ext.R1(a), the Books would show that the mortgage is dated 9.10.1997 and it is seen registered on 15.10.2007. In the light of this, learned counsel for the petitioners did not press the argument in respect of Ext.R1(a). In other words, in respect of Ext.R1(a), it could be taken that the registration was effected in accordance with law and within the time provided.

3. With regard to Ext.R1(b) mortgage, counsel for petitioners would point out that the petitioners stand by their contentions. He would submit that the Index Book produced by the Officer would show that the date, month and the year in which the said mortgage was received in the office is shown as

September, 1999. It is again sought to be explained as a mistake and it is further pointed out that a perusal of the Book would unerringly show that the mortgage dated 27.3.1999 (Ext.R1(b)) was registered on 5.4.1999 which would mean that the mortgage came to be registered within a period of one month from the date of the mortgage, thus, complying with the provisions of Section 10 read with the Rules. Counsel for petitioner would point out that having regard to the entries in the Index Book, the book is under a cloud and it cannot be said that Section 10 and the Rule are complied with in respect of Ext.R1(b) mortgage.

4. Counsel for first respondent points out that this is a case where the conduct of the petitioners is also relevant. He would point out that the documents were with the Bank at the time when Exts.P1 and P2 Sale Deeds were executed in favour of the petitioners. He would point out that the predecessors in interest of the petitioners are not made parties to the Writ Petition. It is pointed out that the pleadings would show that their predecessors in interest represented that the original

documents are missing and in such circumstances the property is purchased by the petitioners without even seeing the original documents. It is also pointed out by the counsel for first respondent that no notice is issued and the petitioners purchased the properties without even seeing the notice published to the effect that the documents of the immediate predecessors in interest of the petitioners were missing.

5. I would think that I need not extend my aid in the exercise of the discretionary jurisdiction under Article 226 to the petitioners, having regard to the facts. Counsel for the Bank would submit that if the petitioners make an application to the bank, the Bank may consider the grant of any concession. It is pointed out by the petitioners that already an amount of Rs.50,000/= has been paid by the petitioners. In such circumstances, while I reject the contentions of the petitioners, I dispose of the Writ Petition directing that if the petitioners move the first respondent Bank within three weeks from today, seeking benefit of any concession in the matter of the amount

payable, the first respondent Bank will consider and take a decision on the same and communicate its decision to the petitioners within a further period of three weeks from the date of receipt of the application.

K. M. JOSEPH, JUDGE

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